STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On its Own Motion	)	
Implementation of the Federal Communication Commission's Triennial Review Order with respect to a Batch Cut Migration Process	)	Docket No. 03-0593

Response of SBC Illinois in Support of
TDS's Motion to Stay Proceedings

SBC Illinois, by its attorneys, hereby submits its Response in Support of TDS Metrocom, LLC's ("TDS") motion to stay this Triennial Review batch cut proceeding. As TDS's motion states, the U.S. Court of Appeals for the D.C. Circuit has ruled that the FCC's *Triennial Review Order* ("*TRO*") is unlawful in numerous respects, including the FCC's "subdelegation to state commissions of decision-making authority over impairment determinations." *USTA v. FCC*, Nos. 00-1012 (consol.), slip op. at 61 (D.C. Cir. March 2, 2004) ("*USTA II*"). Because the Commission initiated and is conducting this proceeding pursuant to the role delegated to it by the FCC's rules – a role and rules that have now been declared unlawful – TDS has requested that the Commission stay this proceeding.

SBC Illinois supports TDS's motion because, as TDS explains, in light of the D.C. Circuit's decision, it would be wasteful and imprudent for the Commission and the parties to continue these proceedings at this time. Indeed, it makes no sense for the Commission and the parties to expend now, before the FCC has developed new unbundling rules (or mounted a successful challenge to *USTA II*) the significant amount of time and resources that evidentiary hearings and subsequent briefing would require, all in an attempt to apply rules declared unlawful and invalid by a unanimous federal Court of Appeals. No party, moreover, will be

harmed or prejudiced by a temporary delay of these proceedings.[1] If the FCC's *TRO*-related rules struck down by the D.C. Circuit are somehow revived, the Commission could immediately recommence the proceedings at that time.

SBC Illinois further states:

1. The FCC released the *TRO*, its third attempt to formulate unbundling rules that comply with federal law, on August 21, 2003. In the *TRO*, the FCC made a national finding of impairment with respect to mass market switching, certain high-capacity loops, and certain forms of dedicated transport, but also concluded that impairment with respect to these network elements may not exist in particular geographic markets. Thus, the FCC delegated to the state commissions the task of examining impairment with respect to these network elements on a more granular, market-specific basis. As part of its mass market switching rules, the FCC directed state commissions to approve, where necessary, a "batch cut" process to mitigate the "impairment" the FCC concluded was caused by existing ILEC hot cut processes. The FCC required that state commissions complete these proceedings within nine months of the *TRO*'s effective date of October 2, 2003. On September 30, 2003, the Commission instituted this docket in order to undertake the responsibilities delegated to the states by the FCC with respect to the "batch cut" component of the FCC's mass market switching rules.[2]

2. On March 2, 2004, the D.C. Circuit held that the portions of the *TRO* and the FCC's rules concerning mass market switching – the same portions under which the Commission is

[1] Further, immediately following the D.C. Circuit's opinion, SBC Communications, Inc. extended an offer to its UNE-P customers for direct, one-on-one talks to negotiate commercially reasonable pricing for SBC's UNE-P product and to continue to offer each UNE-P customer the same UNE-P services for the next 90 days at Commission-approved rates.

[2] Order Initiating Proceeding, Docket No. 03-0593 (September 30, 2003).

acting in this docket and in Docket No. 03-0595 – are unlawful. In particular, the D.C. Circuit made two findings that directly impact this proceeding:

a. First, the Court held that the FCC's delegation to the state commissions of the authority to conduct the nine-month impairment proceedings with respect to mass market switching is unlawful and vacated that delegation, with no remand back to the FCC: "We therefore vacate, as an unlawful subdelegation of the [FCC's] § 251(d)(2) responsibilities, those portions of the [*TRO*] that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements." (Slip op. at 18);

b. Second, the Court vacated as unlawful and remanded to the FCC the FCC's national finding of mass market switching "impairment." The Court stated that the FCC's "impairment" finding due to hot cuts could not stand because, among other reasons, (1) the FCC "implicitly conceded that hot cut difficulties could not support an undifferentiated nationwide impairment finding" (slip op. at 21); and (2) the FCC must consider more "narrowly-tailored alternatives to a blanket requirement that mass market switches be made available as UNEs," such as rolling access (*id.* at 21-22).

3. Because this proceeding was instituted and is being conducted pursuant to authority delegated by the FCC in the *TRO*, which delegation has been declared unlawful, and because this proceeding was instituted and is being conducted to apply FCC mass market switching rules that also have been declared unlawful, TDS has requested that the Commission suspend the briefing schedule and temporarily stay this proceeding.

4. As TDS states, "any revisions made to the TRO by the FCC in response to the [D.C. Circuit's] decision could eliminate the need for this proceeding, or at the very least materially change the determinations to be made by state commissions." TDS Motion at 4. In other words, because the standards upon which this proceeding was predicated have been invalidated, it would be wasteful and imprudent to continue it.

5. As the Commission stated in its Initiating Order, the FCC concluded that "economic and operational barriers caused by the 'hot cut' process" cause impairment, and thus "'put in place concrete steps to mitigate these causes of impairment,'" requiring "state commission to

establish a 'batch cut migration process' within nine months that will address the costs and timeliness of the hot cut process." Initiating Order at 5-6 (quoting *TRO* ¶ 423). The D.C. Circuit, however, has declared unlawful the premise of the FCC's batch cut rules: that ILEC hot cut processes support a nationwide finding of "impairment."

6. Even if the FCC asks state commissions to assist in some manner in the mass market switching impairment determination, the issues will likely be very different than those currently before the Commission in this docket or in Docket No. 03-0595. For instance, to determine whether competitors are "impaired" without access to unbundled local switching to serve mass market customers, the D.C. Circuit has stated that the FCC must be more specific in identifying when entry into a market is "uneconomic." The FCC also must, among other things, examine more "narrowly-tailored alternatives" to blanket unbundling for any markets where impairment might otherwise exist. These issues (and other issues that the FCC must consider as well) are not part of the current proceeding before this Commission. And the issues that are before the Commission in this proceeding – the approval of new "batch cut" processes and prices – cannot possibly play any role in the FCC's determination of whether or where competitors are "impaired" *now* without access to unbundled local circuit switching to serve mass market customers, and are almost certain to play no role in whatever impairment analysis may emerge from further proceedings in the courts and/or the FCC.

7. For all these reasons, it would serve no useful purpose for the Commission to continue with this proceeding at this point, before the FCC formulates its new unbundling rules. Some states, including Minnesota, Nebraska, Oregon, Colorado and Utah, suspended their Triennial Review proceedings even before the D.C. Circuit's opinion issued, and numerous states, including Ohio, Kansas, Washington, Arkansas, and Wisconsin, have similarly suspended

their Triennial Review proceedings or hearing schedules on a temporary basis as a result of the D.C. Circuit's decision. The Commission should follow the same course, conserving the resources of the Commission and the parties until such time as it is clear whether there will be any continuing role for the states, and until that role is clearly defined.

8. The D.C. Circuit stayed the issuance of its mandate until no later than the later of the denial of any petition for rehearing or rehearing en banc or 60 days. Slip op. at 62. SBC Illinois believes that the D.C. Circuit established the 60-day time limit for its stay of the mandate to enable the FCC, should it choose to do so, to implement new unbundling rules and/or to seek from the Supreme Court a stay of the D.C. Circuit's decision. There is room for disagreement about the merits of the D.C. Circuit's decision, but there can be no dispute that continuing Illinois's Triennial Review proceedings would require a substantial commitment of time and resources by the ALJ, the Commission, its Staff, and all parties involved. And there can also be no dispute that if the D.C. Circuit's decision is ultimately upheld, the continuation of these proceedings would result in an enormous waste of public and private resources.[3] On the other hand, if these proceedings are stayed but the opponents of the D.C. Circuit's decision secure from the Supreme Court a stay of the D.C. Circuit's decision, the Commission and the parties can easily pick up right where the proceedings left off and go forward from there.

9. Moreover, as TDS states, even if the D.C. Circuit's decision "were reversed or modified, and the TRO ultimately emerged in its original form and content, it is highly unlikely that the FCC or the courts would continue to hold state commissions to the July 2, 2004 deadlines originally imposed by the TRO for the various state commission determinations." TDS Motion at 4. With, at a minimum, a significant number of states already suspending their

Triennial Review-related proceedings, it is unthinkable that, in the unlikely event the *TRO* is ultimately upheld, the FCC or any court would hold that those states would forfeit their authority to complete their *TRO*-related proceedings if not completed by the original deadline, without any extension for the period between the issuance of the D.C. Circuit's decision and the final disposition of the *TRO* appeals.[4]

10. Accordingly, SBC Illinois recommends that the Commission grant TDS's motion, and specifically recommends that the Commission (i) temporarily abate and/or stay this proceeding until the later of the denial of any petition for rehearing or rehearing en banc or until May 1, 2004 (60 days from March 2, 2004), and (ii) schedule a status hearing to be held in 60-90 days to address what, if any, further steps are appropriate.

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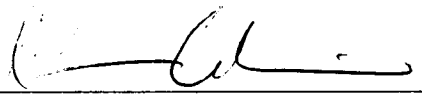
[3] Indeed, the only way this batch cut proceeding could be rendered relevant would be if the Supreme Court were reverse the D.C. Circuit *both* on its unlawful delegation holding *and* on its remand of the FCC's mass market switching impairment finding.

[4] Pursuant to paragraphs 190 and 527 of the *TRO*, the FCC will assume jurisdiction in the event of a "state commission failure to act" only upon the petition of an aggrieved party, and only where the FCC "agrees that the state has failed to act." It is unlikely, to say the least, that in the event the *TRO* is ultimately upheld the FCC would act under this provision to usurp the role of the significant number of states that have already stayed their Triennial Review proceedings and that would undoubtedly miss the original July 2, 2004 deadline. Further, if the Commission stays its Triennial Review proceedings, SBC Illinois will not argue (and in fact would oppose any argument) that the FCC should take jurisdiction over these matters as a result of the Commission missing the July 2 deadline due to time lost during the stay.

Respectfully submitted,
Illinois Bell Telephone Company

By: 

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CERTIFICATE OF SERVICE

I, Dennis G. Friedman, an attorney, certify that a copy of the foregoing RESPONSE OF SBC ILLINOIS IN SUPPORT OF TDS'S MOTION TO STAY PROCEEDINGS was served on the parties on the attached service list by electronic transmission on March 9, 2004.

Dennis G. Friedman